United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1452

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

vs.

LOUIS SORRENTINO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF AND APPENDIX.

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APPELLANT'S BRIEF.

Issues Presented for Review.

The issues presented for review are three in number:

1) Whether the proof at the trial of this indictment, which charged one ongoing conspiracy involving one substantive transaction, actively established at least two independent conspiracies involving numerous substantive transactions, thereby creating a prejudicial variance between the indictment and the proof, which was so patently material as to crucially prejudice appellant's right to a fair trial.

2) Whether appellant's participation in the conspiracy was proved by a fair preponderance of the independent evidence, so as to permit the jury to consider the co-conspirator hearsay, and if not, whether the independent evidence, including legitimate inferences to be drawn therefrom, was such that a reasonable mind might fairly

conclude that the appellant was guilty beyond a reasonable doubt as to either count, so as to permit submission to the Jury.

3) Whether the independent proof was so extremely weak as to be unable to support by itself a conviction on either count, so that the hearsay declarations of fugitive defendant Green were so crucial for the government's case and so devastatingly inculpatory to the appellant, as to violate his Sixth Amendment right of confrontation, especially since there was no indicia of reliability as to the trustworthiness of those declarations, due to a lack of substantially identical independent proof to corroborate them, coupled with the fact that both the declarant and the testifying witnesses had motives to falsify.

History of the Case.

The appellant was charged in a two count indictment with a conspiracy count under Section 846, Title 21 of the United States Code to violate Section 841 (a) (1) and one substantive count under Sec. 841 (a) (1) of possession with intent to distribute cocaine, a Schedule II narcotic substance within the meaning of Sec. 812. The jury trial was before the Hon. Edward Weinfeld on September 8, 1976. The summations, charge and verdicts of guilty on both counts were rendered on September 9, 1976. Of three defendants, only the appellant stood trial. On September 30th the court sentenced appellant to three years imprisonment on each count to run concurrently and three years special probation. A notice of appeal was duly filed on October 8, 1976.

Considering the three issues raised by this appeal, a chronological and precise synopsis of the trial testimony is necessitated.

Statement of Facts.

Testimony of Newman (confidential informant).

Steven Newman, already a convicted felon, was arrested by state officials for selling cocaine (TR 13). He then agreed to cooperate with federal and state authorities (TR 14), in hopeful anticipation that he might be sentenced to lifetime probation, rather than the minimum of six years to the maximum of life (TR 13). Subsequently, in December 1975, he made the acquaintance of co-defendant Richard Hunter (TR 14). Newman testified he asked Hunter where he could obtain cocaine and Hunter replied he would look around (TR 16), while giving Newman his telephone number (TR 44).

In January, 1976 Newman called Hunter and was invited to watch a basketball game at Hunter's apartment in the Gorham Hotel (TR 15). While at the apartment, Newman met Albert Green, the fugitive co-defendant (TR 15). When Newman at that time, again asked Hunter where he could get "an 1/8 of a key of some dynamite cocaine" (TR 15), Hunter "referred" him to Green (TR 16). Green told Newman he knew "three or four sources"; he could "handle the eighth of a key"; it would cost about "five to six thousand" and that he was "staying with" Hunter (TR 17).

Green then called Newman on February 11, 1976, stating "he had half of the amount and it would cost $2,400" (TR 18). Newman after notifying the Joint Task Force (TR 19), called Green back to verify he had the "package of two ounces of cocaine" and informed him that the "buy" could be made on February 12, with the exchange being done "in a car," in which would be his "partner" (TR 19-21) (Undercover Detective Rinaldi).

Newman and Detective Rinaldi drove to the Gorham Hotel (TR 22), where Newman went into the lobby and met Green and Hunter (TR 23). Newman testified that Hunter stated he had just come from "The San Souci bar and that Lou would be the man that had the package, it would be Lou's coke" (TR 23). They went to the undercover car and were introduced by Newman to Rinaldi. Green stated he had to "wait for a 7:30 phone call" (TR 24). Both informed Rinaldi that the cocaine "was belonging to Lou from San Souci" (TR 24), and "mentioned this three or four times" (TR 25). Green left the car to await the call in the hotel and upon returning stated he had "received a call from my man Lou" and that the money should be given in "front" so that "he could walk a few blocks to pick up the package of cocaine and bring it back to the car" (TR 26). Detective Rinaldi told Green he would not front the money and that Green should take a taxi to obtain the cocaine, while Hunter should return to his hotel room to await a call, should the deal prove unsuccessful (TR 26-27). This was done and sometime later Green returned with an "attache case that he had left the car with" (TR 28). Upon entering the car he opened the case, gave the cocaine to Rinadi, who exited to open the trunk to get the money, the signal initiating the arrest of Green (TR 27-28).

Testimony of co-defendant Hunter (a/k/a Love and Tate).

Hunter testified he was a convicted felon (TR 33), a prison escapee (TR 34) and a panderer (TR 55-58). He stated that he had met the appellant Lou in the latter part of 1974 (TR 39, 40, 41, 60) and purchased cocaine from him for his own personal consumption. After eight or nine months from his first purchase, he started to sell cocaine to others for approximately a two or three month period (TR 41); receiving cocaine for his personal use as remuneration. These purchases would be "eight or nine

times a month" (TR 40). Finally, he had to stop both the "purchasing and selling" because of his personal squandering of the proceeds of the sales as well as because of the diminished "strength" of it (TR 41). He further explained that, "about several months ago I stopped altogether, because I had joined the YMCA and I was like, you know, trying to turn over, as far as getting away from that and that type of thing" (TR 42). He had joined the YMCA three months prior to his arrest on February 12, 1976 (TR 43). Hunter also added that within that several month period, "sometime in the latter part of 1975" (TR 43), when he had "stopped altogether" purchasing and selling, he returned one more time to obtain cocaine from Lou for purposes of selling to another (TR 42).

The indictment reads that the conspiracy commenced on the "fifth day of February, 1976," three months after Hunter had "stopped altogther." Nevertheless, the testimony was specifically offered into evidence by the Government and explicitly admitted into evidence by the court, on the singular theory that "the conspiracy existed from late 1974 through the date of the filing of the indictment" (TR 97). It was received by the court for the precise purpose that "the government offered the testimony of this evidence as proof by an alleged conspirator of a conspiracy during the course of which various transactions were had with respect to narcotics" (TR 98) and the "other alleged co-conspirator (Green) joined an existing conspiracy" (TR 99). The government pointedly refused to offer it and the court categorically did not accept it, on the special theory of prior similar acts (TR 96-97; 98; 104-105).

Hunter confirmed making the initial acquaintance of Newman (TR 43), but in response to Newman's first inquiry as to obtaining cocaine, testified, "I didn't know, you know, like where to get it and this is what I told

him" (TR 44). Hunter corroborated that Newman came to his apartment and was introduced to Green (TR 44). He further testified that after Newman left, Green was supposed to see if he could get the quantity (TR 44). Green "made a couple of calls but only one went through, when he got in touch with Louie" (TR 45). Hunter testified that he heard Green on the phone ask for Lou (TR 71), mention two ounces (TR 45), a price of over $2,000 (TR 72), and that there was a conflict as to whether Lou would bring it over (TR 46). Green told Hunter that Louie did not want to give up the cocaine without front money and that he would have to call Lou back (TR 46; 72).

Sometime later, Green made a second call to Lou. This call was not made in the presence of Hunter, but Green told Hunter that the deal was set for 7:00 Thursday (February 12) (TR 47). At no time had Hunter dialed the phone, seen the number dialed or heard Lou's voice (TR 69). Hunter testified that on the very night of the cocaine sale he only went out to eat with Green, and did so solely because Green was "nervous" and his "roommate" (TR 47-48). Hunter testified that from the first time he met Newman he "did not want to get involved" and that he was not to receive any share of the proceeds, but was doing it solely to accommodate Green (TR 63).

Hunter corroborated that when he and Green returned to the hotel, they met Newman in the lobby and went to the car in which Detective Rinaldi was seated. Green left the car to await a call in the hotel, returned and told Hunter that he spoke to Lou who wanted Green to meet him on 65th Street. Hunter then left the car to await the phone call in his room from Green, should the deal not materialize. Hunter thereafter was arrested. He testified he pled guilty to count one, with the promise

that count two would be dismissed and that the government would make a statement on his behalf to the court at the time of sentencing (TR 51-52). Although Hunter had been cooperating with the Government since February, 1976, not until after he was sentenced by the court on August 25, 1976 and before September 8, 1976, the date of this trial, did he inform the government of the subject matter of his testimony (TR 63-64) upon learning that only the appellant would be on trial (TR 74) and not Green.

Testimony of Detective Rinaldi.

Detective Rinaldi testified he drove Newman to the Gorham Hotel (TR 77), where Newman exited into the lobby and returned with Hunter and Green (TR 78). Green said that he would have the two ounces, but had to await a phone call from his connection as to where to pick up the cocaine (TR 78). Hunter told Rinaldi that the fellow who owned the San Souci bar was the man who was supplying the cocaine and when Green left to await the call, Hunter also said that the "Italian guy * * * the connection * * * could get anything from pills to heroin" (TR 79). Green returned stating he received the call and Lou wanted front money. Rinaldi refused, advising Green to go get the cocaine, while Hunter should return to his hotel room to await a call if the deal proved unsuccessful (TR 79-80). Green left and thereafter returned stating "my man is behind me, just give me the money." He gave Rinaldi the cocaine and upon the prearranged signal of Rinaldi getting out of the car and opening the trunk to get the money, the arrest was made (TR 80-81). Rinaldi testified that at the scene on surveillance were Detective Copeland, Police Officer Frederick Bade, Detective DelCorso, Detective Daly, Group Supervisor Harold Rodell, and Assistant Supervisor Sargent Farkenall (TR 77).

Detective John Copeland and Police Officer Frederick Bade.

Both testified as to their observance of the car scenario. Copeland added that when Green returned to the scene of the crime, he arrived in a black Pontiac operated by a white male whose face he could not see (TR 85-86). While Green was in the black Pontiac, it backed up and bumped the bumper of Copeland's car. Green then exited and as he reached the undercover car, the black Pontiac pulled out with the lights off (TR 86). The car had pulled out prior to the arrest of Green.

Officer Bade testified that Green had an attache case when he initially left the undercover car (TR 89). He also made an in court identification of the appellant, which was based upon the fact that he had seen a white male with grayish hair drive past him, whom he had never seen before (TR 90). Bade testified that the car was going approximately eight to ten miles an hour, with the lights out (TR 90). Bade had been alerted to get the license plate number as the car went by (TR 90) and in doing so, later ascertain it was registered to a leasing company (TR 91).

Stipulations.

There was a stipulation (G. X. 3) that on February 4, 1976 the appellant had signed a vehicle receipt document from the Term Vehicle Leasing Corporation for the black Pontiac, which receipt was received in evidence as (G. X. 2); that the appellant was the bar manager of the San Souci Bar and Grill and that (G. X 1) the white substance was cocaine.

The appellant rested at the completion of the Government's case.

POINT I.

There was a prejudicial and material variance between the indictment and proof, which affected defendant's right to a fair trial in that the indictment charged one conspiracy with one transaction, whereas the proof evidenced at least two conspiracies with many transactions.

The lower court did not have a trial transcript at its disposal so as to peruse it in conjunction with this crucial ruling. Thus, the Appellate Court has the decisive benefit of being "able to view the record as a unit and has the advantage of reading the completed testimony, an advantage which the trial court did not have." *U. S. vs. Cassino*, 467 F. 2d 610, 617 2nd Cir. 1972).

The indictment charged that a conspiracy commenced on the "5th day of February 1976" and resulted in the substantive count of one sale of cocaine on February 12, 1976. Hunter had testified as to prior sales of cocaine by the appellant to him for his own personal use (TR 40-41), which started in the "last part of 1974" (TR 39-40; TR 41) "for an eight to nine month period" (TR 41). At the termination of those eight or nine months and then for a period of about another "two or three months," he sold cocaine to others and upon returning the proceeds of the sales, received cocaine as payment (TR 41). The purchases ranged from "$50" to "$300" (TR 39) and were done "eight or nine times a month, if not more" (TR 40).

The arrangement as to his selling cocaine for the use of others had ceased, because he "wasn't bringing the correct money back" since he was "playing the horses and just spending it in general" (TR 41-42). The arrangement as to his purchasing of cocaine for his own use also ceased, because as he testified:

> "At first I stopped when his quality, you know was like going down as far as in strength of it and then I started back and then about say about several months ago I *stopped altogether*, because I had joined the YMCA and I was like, you know, trying to turn over, as far as getting away from that and that type of thing and then within that six months, I went back once more to sum up, you know, for someone else" (TR 42).

In this respect, Hunter testified he had joined the YMCA, in the latter part of 1975, "about three months" before his arrest on February 12, 1976 (TR 43). Thus on about November 12, 1975, for a period of approximately three months before the commencement of the alleged conspiracy on February 5, 1976, he had "stopped altogether" (TR 42). He had stopped both "purchasing and selling" (TR 42).

The court in camera asked "Is the government contending that these are prior similar acts or that they are acts in furtherance of a conspiracy? (TR 96) The Government replied "We submit it on the theory that the conspiracy existed from late 1974 through the filing of the indictment" to which the court responded "a continuing conspiracy" (TR 97). Thus the testimony was permitted by the court on that theory, although defense counsel stated the evidence did not establish it was "part of the same conspiracy which is alleged in the indictment" (TR 97) but instead was "evidence of prior similar acts" (TR 96, 98; 103). The court stated "You keep on talking of similar acts and conduct and I do not understand the government offered it on that theory at all. The government offered the testimony of this witness (Hunter) as proof by an alleged conspirator of a conspiracy during the course of which various transactions were had with respect to narcotics" (TR 98). The Government stated "That is correct your Honor. That is the theory the Government submitted the testimony concerning the events

prior to the date in the indictment. . . e Government's theory is that the conspiracy existed and continued during the course of a year and a half . . . Green then subsequently joined the conspiracy that continued." (TR 98-99). The court stated "in other words the other alleged co-conspirator (Green) joined an existing conspiracy", to which the Government replied "That is correct" (TR 99).

In *U. S. vs. Kaplan*, 510 F. 2d 606, 613 (2nd Cir. 1974), the court affirmed the principle "the grounds upon which the . . . (ruling) is based are those upon which it must be judged." This is especially true since the instant case is distinguishable from *U. S. vs. Rosenstein*, 474 F. 2d 705 (2nd Cir. 1973), under the rationale of the *Kaplan* court. 1) The purpose for which the testimony was explicitly permitted, to wit, direct evidence of a continuing conspiracy, is totally different from the purpose of prior similar acts. Most importantly, having been specifically admitted for the avowed purpose of the former, the appellant was denied the benefit of the cautionary charge as to the latter. *U. S. vs. Papadakis*, 510 F. 2d 287, 295 (2nd Cir. 1975); 2) The trial court did in fact address itself to both of the theories but chose to reject the latter and 3) The non-hearsay evidence of the conspiracy in this case is far from being overwhelming or compelling.

Granted that "a conspiracy once established is presumed to continue until the contrary is shown." *U. S. vs. Stromberg*, 268 F. 2d 256, 263 (2nd Cir. 1959), the trial transcript conclusively evidences through Hunter's own testimony, his "affirmative proof of withdrawal" *U. S. vs. Cianchetti*, 315 F. 2d 584, 589 (2nd Cir. 1963), from the alleged pre-existing conspiracy. He was stopped from selling to others, because he was misappropriating the proceeds and he stopped purchasing for his own use, because he was rehabilitating himself by joining the YMCA. Thus, since he "stopped altogether" any form of narcotic transaction when he joined the YMCA,

which membership commenced three months prior to his arrest on February 12th, 1976, the pre-existing conspiracy chronologically terminated on about November 12, 1975, approximately three months before February 5, 1976, the date of the commencement of the conspiracy charged in the indictment. Therefore he had stopped both the purchasing and selling (TR 42) of the alleged pre-existing conspiracy three months prior to the charged conspiracy. Obviously, his misappropriation of the proceeds of sales, corroborates that no longer was there "the existence of a single conspiracy linked together by cooperation, trust and mutual source of supply." *U. S. vs. Tramunti,* 513 F. 2d 1087, 1106 (2nd Cir. 1975). Nevertheless, the prior transactions were admitted into evidence under the theory of one continuing conspiracy, while the trial testimony categorically established that there was "no ample evidence of a single, ongoing continuous conspiracy." *U. S. vs. Cirillo,* 468 F. 2d 1233, 1238 (2nd Cir. 1972).

Moreover, the facts of this case do not evidence "the existence of a broad (cocaine) conspiracy of which the conspiracy charged in the instant indictment was a part." *U. S. vs. Araujo,* 539 F. 2d 287, 289 (2nd Cir. 1976). Thus the jury was not "entitled to find as it did, that the defendant belonged to a single loose knit conspiracy" Tramunti, *supra,* at 1107. For the conspiracy charged in the indictment was not an intricate, international operation involving suppliers, exporters, importers, distributors and purchasers all dealing in substantial quantities of narcotics so as to necessitate a "loose knit" concept of a single continuing conspiracy. *U. S. vs. Leong,* 536 F. 2d 993, 995 (2nd Cir. 1976). Instead, the conspiracy charged was a non-complex, highly localized operation with no more than three or four participants evidencing a tight knit operation. To permit its extension in time for over a year prior to the date alleged in the indictment, allowing evidence of numerous sales not mentioned in

the indictment, entertaining the multiplication of unknowin 3rd party purchasers, and sanctioning the introduction of testimony as to a range of purchase prices, indeed materially prejudiced the appellant.

Hunter patently had "taken steps to withdraw", even giving the detailed reasons for his decision, so that the fact he went back for a "one shot venture." *U. S. vs. Santana*, 503 F. 2d 710, 714 (2nd Cir. 1974), does not evidence a continuing role in an ongoing conspiracy. All the prior transactions as well as this one final isolated transaction after he had "stopped altogether", were separate and distinct operations which were not part of the conspiracy charged in the indictment. Indeed, there was no such "abundant evidence" that is "no substantial trial testimony, corroborated by visual surveillance" in order "to prove an integrated and continuing conspiracy." *U. S. vs. Sperling*, 506 F. 2d 1323, 1340 (2nd Cir. 1974). On the contrary, the exact opposite was established at the trial.

The government in its summation, emphasized these prior transactions (TR 108-109) to lend overall credence to the specific charges in the indictment under the theory of a continuing conspiracy. This all-enveloping theory was resubmitted to the jury by the court in its charge, coupled with the resulting imputation of liabilities and responsibilities from one co-conspirator to another (TR 144-145). Considering then, that the indictment charged one simple conspiracy with one transaction, while the proof showed at least two with many transactions and considering the potent emphasis placed upon such evidence by the Government in its summation, as reinforced by the courts charge, the appellant was "so prejudiced by the variance as to be entitled to a reversal of the conviction." *U. S. vs. Bertolotti*, 529 F. 2d 149, 155 (2nd Cir. 1975). It can be categorically stated as to these

prior transactions, that which the court observed in *U. S. vs. Cirillo*, 468 F. 2d 1233, 1238, Note 6 (2nd Cir. 1972): "The claim is a serious one in view of the imposing effect evidence of the second transaction may have had on the jury's deliberations."

Moreover upon an evaluation of the evidence, the appellant's "connection to the overall conspiracy was so tenuous and different in quality," *U. S. vs. Calabro*, 467 F. 2d 973, 983 (2nd Cir. 1972), from that of self confessed co-defendant Hunter and the fugitive co-defendant Green, that irreparable prejudice was caused by this variance irrespective of any excessive care taken by the court in its charge (TR 144-145). The Government fully knew that the testimonial proof of the other conspiracy could not lend itself to an indictable charge, so as to permit it being joined in one indictment or consolidated for one trial. *U. S. vs. Aquesi*, 310 F. 2d 817, 827 (2nd Cir. 1962). Thus this evidence not only created a "double jeopardy problem," Calabro, supra, at 983, when and if such proof becomes available, but it also "had all the prejudicial effect from which the rule against introducing evidence of prior bad acts was designed to protect." *U. S. vs. Torres*, 503 F. 2d 1120, 1125 (2nd Cir. 1974). These prior transactions, prejudicially exploited under the theory of a continuing conspiracy, established that since Hunter dealt in narcotics with the appellant in the past, the appellants alleged prior proclivities dictated his participation with Hunter in the conspiracy charged on trial.

Under the theory of one continuing conspiracy, the prejudicial spill over effect caused by the substantial transference of guilt from the prior transactions to the specific charges within the indictment, is compounded by the fact that Hunter had admitted to the jury that he himself pled guilty to the conspiracy charged, which very conspiracy included the prior transactions he revealed.

The prejudice was further magnified by the fact that the prior transactions, although not mentioned as "overt acts" in the indictment were "affirmative proof," Torres, *supra*, at 1125, to establish the overall charges for which there was a dearth of independent evidence. Finally the prejudice was blown out of proportion, when the Court advanced the theory that Green joined an existing conspiracy between Hunter and the appellant, which necessarily included the prior transactions. Thus, this error obviously contributed to the verdict. *Chapman vs. California*, 386 U. S. 18, 24, 87 S. Ct. 824.

This variance was one of "convenience" for the prosecution, Bertolloti, *supra*, at 155, while being critically prejudicial to the appellant, considering the damaging hearsay subsequently testified to by Hunter as to Green. Bertolloti at 156, Note 12. To have permitted this evidence under the theory for which it was submitted to the jury had to unfairly influence its verdict. The appellant could not avoid "guilt by association as the touchstone in their (the Jury's) deliberations," *U. S. vs. Papadakis*, 510 F. 2d 287, 300 (2nd Cir. 1975), after a self-confessed co-conspirator admitted to other independent crimes as being part of a conspiracy he confessed to having committed. Considering all of the above, the admission of this evidence under the theory expressed, did "affect the substantial rights of the accused." *Berger vs. U. S.*, 295 U. S. 78, 82, 55 S. Ct. 629, 630; *U. S. vs. Aquecci*, 310 F. 817, 827 (2nd Cir. 1962); especially since the Government's case against the appellant was anything but overwhelming, so that the use of the prior transactions may have been the "weight that tipped the scales against him." *Krulewitch vs. U. S.*, 336 U. S. 440, 445, 69 S. Ct. 716.

Finally, the testimony of Hunter that he in fact did not know where to get cocaine (TR 44) and so advised Newman at the very first time he met him and that on the

second occasion he met Newman he referred him to Green (TR 45), demonstrated his inability and disinterest (TR 16) in participating in the conspiracy charged. Moreover, the fact that Green told Newman he had "three or four sources" (TR 17) and in the presence of Hunter subsequently made "a couple of calls" ultimately resulting in the alleged final call to the appellant (TR 45), indicated that there was no exclusive ongoing conspiratorial relationship solely with the appellant and Hunter. In addition it is relevant to point out, that Hunter had testified "he did not want to get involved" (TR 63); solely went with Green to a restaurant on the night in question, because Green was his "roomate" and "nervous" (TR 47) and that he was to receive no share of the proceeds (TR 63), but went along with Green only to accommodate him. All of this testimony evidences that not only had the old conspiracy terminated, but also that Hunter had no intention to participate in a new one. Thus the Courts' instructions that Green joined an existing conspiracy, which necessarily included the alleged prior transactions between Hunter and the appellant, intensifies the prejudice.

POINT II.

The threshold test of a fair preponderance of the independent evidence had not been met to render admissible the hearsay evidence, and consequently the independent evidence was insufficient for a reasonable mind to fairly conclude that the defendant was guilty beyond a reasonable doubt on the two counts charged in the indictment.

The analysis of the hearsay and non-hearsay evidence as against the appellant, demonstrates that there was no

fair preponderance of the independent evidence so as to warrant the introduction of the incriminating hearsay evidence.

1) The evidence of the alleged prior narcotic transactions was inadmissible for the specific theory for which it was explicitly offered and permitted to be introduced. It should not have been submitted to the jury as direct evidence bearing on either the charged conspiracy, or by way of the Pinkerton charge, on the substantive count. This was fully discussed in Point I. It should be observed that the refusal by the Court to permit the testimony of prior transactions into evidence under the theory of prior similar acts, signifies the inherent problem of that theory under the unique circumstance of this case. A fact the government fully realized, considering its explicit refusal to submit the prior transaction under that theory. The "parallel" between the acts charged in the indictment and the prior acts shown by the testimony was not so "sufficient" so as to give those prior transactions "real probative value regarding the willingness and intent to enter into the proven conspiracy, rather than merely suggesting that appellant was of poor character." *U. S. vs. Viruet*, 539 F. 2d 295, 297 (2nd Cir. 1976).

2) The subject matter of the alleged telephone calls by the fugitive co-defendant Green to the appellant, testified to by co-defendant Hunter without independant evidence materially substantiating that Green in fact called the appellant and that the appellant in fact spoke to Green, was pure co-conspirator hearsay. *U. S. vs. Zane*, 495 F. 2d 683, 697 (2nd Cir. 1974). In this case there was no potent circumstantial evidence to identify the appellant as having been the person on the other end of the phone, since Hunter did not dial the number, see the number dialed or hear or speak to the person allegedly called and since there was no one at the appellant's end of the telephone to corroborate that the

appellant in fact was called. *U. S. vs. Fassoulis*, 445 F. 2d 13, 17 (2nd Cir. 1971). In *U. S. vs. Cimino*, 321 F. 2d 509, 511 (2nd Cir. 1963), both ends of the telephone call had been under surveillance by government agents, so as to render the call independant evidence. Moreover, the aggregate circumstances surrounding these calls do not make it "extremely remote or highly improbable that anyone other than the defendant was the declarant." *U. S. vs. Lo Bue*, 180 F. Supp. 955, 956 (S.D.N.Y. 1960), affirmed *U. S. vs. Aqueci*, 310 F. 2d 817 (2nd Cir. 1962).

3) On the night of the cocaine sale, the testimony by co-defendant Hunter (TR 48-49) that Green told him he received a call from Lou who wanted him to go to 65th Street, was pure hearsay. The testimony by Newman on that night, that Hunter told him that he had just come from the San Souci and that the coke was Lou's (TR 23), was contradicted by Hunter himself. For Hunter testified that on the night in question, all he did was to go out to eat with Green, because he was his "roomate" and "nervous" (TR 47-48). The testimony by Newman that both Hunter and Green had repeatedly mentioned it was Lou's coke (TR 24) and the testimony by Rinaldi that Hunter, in the absence of Green, had stated that the connection Lou was "Italian," coupled with the testimony by Rinaldi that Green upon his return stated, "my man is behind me," categorically indicated that Hunter and Green, definitely wanted to make their listeners totally aware of the fact that they were mob connected to prevent a possible rip off. The testimony of Detective Rinaldi as to what co-defendant Green had said that appellant stated (to front the money, etc.) was also hearsay. None of the statements were made in the presence of the appellant. *U. S. vs. Wiley*, 519 F. 2d 1348, 1350 (2nd Cir. 1975).

4) The only independant evidence was that the appellant was the manager of the San Souci from June of 1974, signed a pick up receipt for a car leased by another 8 days prior to the date of the substantive count, drove Green in that car to the Gorham Hotel and then prior to the arrest of Green left the area going eight to ten miles per hour, having initially pulled out from his parking place with the front lights off.

Thus the total trial testimony renders uniquely applicable the statement of the court in *U. S. vs. Santana*, 503 F. 2d 710, 713 (2nd Cir. 1974).

> "The process of compartmentalizing hearsay and non-hearsay proof of conspiracy for the purpose of separately weighing the latter, can sometimes be a difficult task, even for the experienced trial Judge, principally because of the risk that incriminating hearsay may unconsciously influence the courts evaluation of relatively weak non-hearsay."

In the instant case, the hearsay evidence against the appellant was extremely incriminating, while the non-hearsay evidence was exceptionally weak. Below is a legal analysis of the non-hearsay evidence.

a) The fact that the appellant was a bar manager at the San Souci Bar where Hunter met him, is even more of "a neutral matter" than one defendant associating with a co-defendant in a "Social Club," especially since a bar manager does not choose with whom to speak and his greeting a customer does not confirm a "likelihood of the established relationship." *U. S. vs. Tramunti*, 513 F. 2d 1087, 1108-1109 (2nd Cir. 1975).

b) The fact that the appellant eight days prior to the substantive crime, signed a pick up receipt for a car leased to another and thereafter, in that car drove the

fugitive co-defendant Green to the scene of the crime, does not even render him a "causal facilitator," *U. S. vs. Jones*, 308 F. 2d 26, 30 (2nd Cir. 1962), which if it did would not be enough. But instead "his momentary presence" as "the driver of an automobile," *United States vs. Vilhotti*, 452 F. 2d 1186, 1189 (2nd Cir. 1971), demonstrates he was a "chauffer" and not even an "armed" one, *U. S. vs. Seward*, 451 F. 2d 1203, 1207 (2nd Cir. 1971); all of which is still inadequate.

Moreover, this non-hearsay evidence does not even impute "knowledge" to the appellant that "a crime was being committed," which even if it did, "coupled with presence at the scene" would nevertheless be insufficient. *U. S. vs. Garguilo*, 310 F. 2d 249, 253 (2nd Cir. 1962). Most significantly, the driving of the automobile was not a "transactional element of the crime" since appellant was not in a car where "secreted drugs were found" or "where the delivery of narcotics was made." *U. S. vs. [illegible]ld*, 474 F. 2d 872, 876 (2nd Cir. 1973). In short the appellant alleged act of "providing and operating the means of transportation" did not constitute "an essential contribution to the commission of the crime" *Mack vs. U. S.*, 326 F. 2d 481, 486 (8th Cir. 1964), in that appellant was not "in attendance at the closing of negotiations in (his) automobile." See *Terrel, supra*.

c) That the appellant parked the car and when Green exited, he pulled away prior to the arrest of Green, with lights momentarily off, at a speed of eight to ten miles per hour, does not indicate "any evasive automobile action" either prior to or subsequent to the parking. *U. S. vs. D'Amato*, 493 F. 2d 359, 365 (2nd Cir. 1974) (intentionally squaring blocks in mid-Manhattan, swerving across three lanes at 75 miles per hour to take an expressway exit and squaring large areas in Queens). His

conduct did not constitute "extraordinary traffic maneuvers." *U. S. v. Mariani*, 539 F. 2d 915, 920 (2nd Cir. 1976), considering that there is a 30 mile an hour limit within N.Y.C. and many motorists turn on the ignition before the lights, while often times forgeting to do the latter. Moreover, since co-defendant Green had not been arrested until after the appellant had driven away, this action did not even indicate he was "making an effort to extricate himself from suspicious circumstances" *U. S. vs. Kearse*, 444 F. 2d 62, 64 (2nd Cir. 1971), which still would be insufficient. But most importantly, unlike *U. S. vs. Lubrano*, 529 F. 2d 633, 636 (2nd Cir. 1975), defendant Green did not leave the undercover car and thereafter return in the appellant's car with anything more than that which he had initially left, to wit, an attache case, so that there was no evidence of a subsequent "bulging," enabling the jury to find "that appellant was not merely present, but was an active participant." All in all, the appellant's behavior in view of the overall circumstances was weakly circumstantial and far from "compelling," *U. S. vs. Rizzuto*, 504 F. 2d 419, 420 (2nd Cir. 1974), especially since there were no "obviously suspicious circumstances" or meetings at "unusual places." *Rizzuto, supra*, at 421.

Thus, the most that has been proven here, is "mere association with persons engaged in a criminal enterprise" coupled with "presence at the scene of the crime," which is not enough. *U. S. vs. Cirillo*, 499 F. 2d 872, 883 (2nd Cir. 1971). There must be some basis for inferring that a defendant knew about the enterprise and intended to participate in it, so as to make it succeed. *U. S. vs. Peoni*, 100 F. 2d 401, 402 (2nd Cir. 1938). There is no such independant evidence in this case. The "qualitative nature," *U. S. vs. Torres*, 503 F. 2d 1120, 1124 (2nd Cir. 1974), of the single act of driving the car by the appellant, under the specific circumstances of this case, far

from evidenced participation in the conspiracy, especially since there was no independent evidence to even attribute knowledge to the appellant, other than the hearsay statements of a fugitive co-defendant, testified to by a self-confessed co-conspirator and an informer who wanted to avoid life imprisonment. Thus, there was no sufficient independent non-hearsay evidence to support the courts finding that the appellant associated himself with the venture, so as to permit into evidence as against the appellant the hearsay declarations of co-conspirators.

This was a one "episode" case, so that it must gain "color" from itself, not having the benefit of deriving criminal significance from similar "episodes." *U. S. vs. Monica*, 295 F. 2d 400, 401 (2nd Cir. 1961). Thus in the instant case there was no "similar pattern of events" as in *U. S. vs. Ruiz*, 477 F. 2d 918, 919-20 (2nd Cir. 1973). Even if the prior transactions with Hunter were admissible in evidence under the one continuing conspiracy theory, they involved a pattern of events and episodes totally dissimilar to those of the instant case. It must be noted that in *U. S. vs. Euphemia*, 261 F. 2d 441 (2nd Cir. 1958), the defendant whose conduct was more incriminating, to wit, prior associations with conspirators, driving in a car with co-conspirators, presence at scene of crime, suspicious circumstances of turning his head to look up and down the street and false exculpatory statements, nevertheless proved insufficient. Also, in *Euphemia* there were statements by a co-conspirator as to the defendant being a "partner," which statements are equivalent to those by Green in the instant case as to "my man" and the various other statements on the night of the crime, as to Lou being the connection; none of which were made in the presence of the appellant.

As a consequence of excluding the hearsay evidence and/or the incompetent evidence as to the prior transactions, the remaining independent evidence incompassing the totality of the appellant's actions in the driving of a car, being the bar manager of San Souci and having signed a vehicle receipt pick up slip, did not warrant that the two counts contained in the indictment be submitted to the jury. The rule of *U. S. vs. Wiley*, 519 F. 2d 1348, 1349 (2nd Cir. 1975), citing *U. S. vs. Taylor*, 464 F. 2d 240 (2nd Cir. 1972), is:

> "In determining whether to submit a criminal case to a jury, the court must determine whether upon the evidence taken as a whole a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt."

In the instant case there was an obvious failure of proof of the essential elements of the crimes charged, which was not remedied by inferences that could have been legitimately drawn from the proven conduct of the appellant. Instead the inferences that must be drawn from the proven actions of the appellant in order to satisfy the elements of the crimes, would necessarily violate the formula of *U. S. vs. Tarantaris*, 515 F. 2d 1070, 1075 note 10 (2nd Cir. 1975):

> "An inference relied on to establish an element of a crime will be rejected as violative of due process 'unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' *Leary vs. U. S.*, 395 U. S. 6, 36, 89 S. Ct. 1532, 1548."

The proven facts that the appellant was the bar manager of San Souci, picked up a car leased to another one week prior to the substantive crime, coupled with his total car activities at the scene of the crime, do not verify the

presumed fact of knowledgable participation in a conspiracy to distribute cocaine or the knowing intent to distribute it. Obviously, the inferences that were drawn necessarily had to be prejudicially colored by the taint of the impermissible hearsay testimony and the incompetent testimony as to the prior transactions. Furthermore, the mutual dependance of the two counts, through the Pinkerton charge, magnified this prejudice in that the jury was permitted to transfer inferences for purposes of the substantive count.

This case ideally exemplifies the unique function of the court in conspiracy cases. For to have permitted either of the two counts to be submitted to the jury, with the testimony of the prior transactions bearing on one continuing conspiracy and with the devastating hearsay declarations bearing on both the counts, the charge of the court, although errorless in composition, operationally became prejudicial. That is to say, regardless of the legalistic perfection of the intricate charge to the jury, since in fact the crucial hearsay testimony and the non-hearsay testimony as to prior transactions were prejudicially permitted for the jury's consideration on both the counts, the required charge, by its very nature, necessarily compounded the prejudicial admission of both.

The court brilliantly described the elements necessary for proof as to the conspiracy count. The jury was correctly charged that in order to establish the existence of a conspiracy they are to consider "all the evidence which has been submitted with respect to the conduct, acts and declarations of each alleged co-conspirator and such inferences as may be reasonable drawn therefrom" (TR 142). Consequently, the impermissible hearsay declarations by Green as against the appellant, testified to by Hunter, Newman and Rinaldi, and the prejudicial prior transactions necessarily inculpated the appellant. This

is patently evidenced, since the court properly charged "his participation in the conspiracy must be established by the independent evidence of his own acts, statements and conduct as well as those of the other alleged co-conspirator and the reasonable inferences to be drawn therefrom" (TR 142). Moreover, the Court in correctly summarizing testimony, referred to those prior transactions as being part of one conspiracy and that Green having joined an existing conspiracy, his acts were "binding upon all other members of the conspiracy" (TR 144). Consequently, this necessarily inculpated the appellant because of the devastating hearsay statements by Green admitted into evidence without having passed the threshold test.

In light of this paradoxical situation, the jury was impeded from finding that Sorrentino was not part of the conspiracy so as not to be responsible for the personal acts and declarations of Hunter or Green (TR 145), considering the absolute incrimination of the hearsay statements testified to by Hunter and Newman, coupled with the prior transactions. Moreover, the jury was hindered from finding that the sale of cocaine was not binding upon Sorrentino (TR 146), since the inadmissible hearsay which the jury was permitted to consider, was in fact patently inculpatory on that score. Furthermore, the jury having the inadmissible hearsay and prior transactions before it, necessarily imputed illegality to the simple chauffering of the car, irrespective of the charge by the court (TR 150-1). The jury having been permitted to receive the prejudicial evidence on the prior transactions as being part of one conspiracy, considering all the devastatingly inculpatory hearsay, was more than predisposed to accept the very basis for which the court itself had initially allowed it (TR 153).

By the same token, the court precisely defined the elements of the substantive count. The jury was permitted to choose one of two theories: the specific intent theory (154-159), or the Pinkerton theory (160-161). In doing this, all the incompetent hearsay and prior transactions were allowed to be considered as to the substantive count. The court correctly pointed out that the government in large measure relied on the testimony of Hunter to prove both the conspiracy and the substantive count (160-161) and that Hunter by his own admission was a participant in the conspiracy to which he pled guilty (TR 163). The court submitted that the ultimate question was did Hunter come clean or did he have an ulterior purpose (TR 164). The jury was advised to reject or accept Hunter's testimony based upon whether they believed him to be truthful or not. But the point is that most of his testimony should not have been permitted in evidence in the first place, so as to submit the issue of Hunter's credibility as to that testimony which should have been excluded.

Finally, presupposing that the substantive count could have been submitted to the jury on its own merit, the general rule discussed in *U. S. vs. Jacobs*, 475 F. 2d 270, 283, 284 (2nd Cir. 1973) as to two instructions, one being erroneously prejudicial and the other being correct, applies here. For the two instructions pertained not to the conspiracy count, but to the substantive count, so that the jury could have concluded guilt on the substantive count having predicated it upon the conspiracy count, due to the Pinkerton charge. Thus, the substantive count was submitted to the jury with all the impermissible hearsay, as well as with the testimony as to the prior transactions.

POINT III.

The appellant's Sixth Amendment right of confrontation was violated since the hearsay statements of fugitive Green were crucial for the Government's extremely weak case and clearly inculpatory to the appellant; while these declarations were not only testified to by witnesses who had motives to falsify, but also there was no substantial, identical evidence to corroborate them, so as to impute any indicia of reliability to the declarant, who himself had a motive to falsify.

The testimony of the informer Newman, who desired to avoid life imprisonment, of the co-defendant Hunter, who pled guilty prior to trial and of Detective Rinaldi, all relating to what Green (the fugitive co-defendant) had said that the appellant had stated, was hearsay which could be admissible in furtherance of a conspiracy. It is an accepted exception to the rule, which categorically recognizes the singular importance of subjecting evidentiary statements to vigorous challenge by thorough cross-examination of the declarant during at least some stage in the proceedings by a defendant. *California vs. Green*, 399 U. S. 145, 90 S. Ct. 1930. However, this exception is not totally without limitation. Thus in *U. S. vs. Puco*, 476 F. 2d 1099, 1107 (2nd Cir. 1973), the Court in applying the standards of *Dutton vs. Evans*, 400 U. S. 74, 91 S. Ct. 210, for purposes of reconciling both concepts, recommended that prior to admitting the introduction of an out-of-court statement into a trial that "the statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination."

The instant case, considering the guidelines set in *Puco*, evidences that there was no "indicia of reliability" for these statements.

1) In *Puco*, an agent testified as to statements a co-conspirator (Gonzalez) made in his presence, which verbal statements were independantly substantiated by co-temporaneous non-verbal actions of both the declarant (Gonzalez) and the defendant on trial. Thus, Gonzalez, declarations were described as "reliable." *Puco, supra,* at 1104. Moreover, the factual circumstances of that case clearly evidenced that Gonzalez had no "motive to falsify" (*Puco* at 1104) at the time he made the statements. In the instant case, the declarations of Green testified to by Hunter, as to the subject matter of the alleged three telephone calls to the appellant, had no such visually simultaneous independent corroboration, so as to be considered "reliable." As a matter of fact, it is indeed perplexing that none of the six officers on surveillance during the night of the cocaine transaction, followed Green when he left the undercover car to allegedly obtain the cocaine from the appellant or followed the appellant after he left the scene of the crime. Moreover, the factual circumstances of this case warrant a conclusion that Green had a "motive to falsify," since he clearly intended to create the unequivocal impression that he and Hunter were mob-connected so as to prevent any possible rip-off. On this point, it is materially relevant that both Green and Hunter repeatedly stated to Newman and Rinaldi, at least "three or four times," that the cocaine belonged to Lou and when Hunter's roommate Green allegedly went to pick up the cocaine, Hunter explicitly stated to Rinaldi that Lou was an "Italian," ending with the statement by Green upon his return, that his "man (Lou) was behind him." Thus the factual circumstances of this case evidence a motive to falsify.

Unlike the *Puco* case, it was not a government agent testifying to the damaging declarations as to the telephone calls, but Hunter, a convicted narcotic peddler,

an admitted panderer, a prison escapee and one who pled guilty to the underlying charges in the indictment; a person who himself was far from reliable and had a motive to falsify. Moreover, the testimony of the informant Newman, that Hunter told him on the night of the transaction when they met in the lobby of the hotel, that he had "just come from the San Souci Bar and that Lou would be the man that had the package, it would be Lou's coke" (TR 23), was totally contradicted by Hunter himself. For Hunter testified that on that very night in question all he had done was, "we (Green & he) went to a restaurant to get something to eat" and "after we got through eating we came back to the hotel" where they met Newman (TR 47-48). Of course, Newman, a not yet sentenced felon who was endeavoring to avoid life imprisonment, was also far from reliable and indeed had a motive to falsify. Rinaldi's testimony is only as reliable as the sources from which it came, to wit, Green and Hunter, both of whom had a motive to falsify; namely their desire to indicate that they were mob connected.

2) In *Puco*, the agent's testimony as to the statements of Gonzalez, "although helpful to the prosecution came as a part of a sequence of events that made the statement almost unnecessary." (At page 1104.) In the instant case Hunter's testimony as to the statement of Green were "essential, indeed central to the prosecutors case." *Ibid.* It was those statements concerning the three telephone calls regarding the narcotic transaction and the alleged picking up of the narcotics, which entered the jury's deliberation as to the existance of the essential elements in proving the two counts for which the appellant was convicted. These statements gave criminal significance to the overall neutral car incident. Indeed, they were "clearly inculpatory" as against the appellant and "vitally important" for the government's case. *U. S. vs. Wingate*, 520 F. 2d 309, 313 (2nd Cir. 1975). They certainly could

not be considered as only being "of peripheral significance." *Dutton, supra*, at 87.

3) In *Puco*, Gonzalez could have been called as a witness by the defendant. In the instant case, the whereabouts of Green was unknown since he was a fugitive, so that obviously Green "was not on the stand ready to testify." *U. S. vs. Pacelli*, 470 F. 2d 67, 69 (2nd Cir. 1972). Moreover, in *Puco* (at page 1105) the government was strategically hampered from putting Gonzalez on the stand. In the instant case, the government indeed benefited by the fact that Green was a fugitive and as a matter of fact, since Green was "theoretically available." *U. S. vs. Damato*, 493 F. 2d 359, 365 (2nd Cir. 1974), the Government had the potential of producing him at any moment.

4) The statements of Gonzalez in the *Puco* case were made against his penal interests, while being testified to by an agent, who by his official capacity and visual observations, imputed trustworthiness to the declarations. In the instant case, although the statements made by Green could in the general sense be considered as being against his penal interests, they were in fact specifically made to afford him the greatest degree of protection for his very own personal interests. Self-preservation was vitally more important than self-incrimination. Moreover, they were testified to by Hunter and Newman and their veracity as well as the lack of independent corroboration, does not lend an element of trustworthiness to these alleged declarations. Not only did Hunter and Newman have every reason to falsify statements, but both had every license to do so since Green was a fugitive. It is interesting to note that Hunter was cooperating with the Government from the time of his arrest on Feb. 12, 1976. However, his memory as to the subject matter of his testimony did not return to him until after

his sentence on August 25, 1976. It returned when he learned that the appellant would be on trial September 8, 1976 and that Green would not be present for the trial. The opportunity to test the accuracy of Green's declarations by cross examination of witnesses like Hunter and Newman, could only prove to be one of formality and an exercise in futility.

Under the unique circumstances of this case, the highly inculpatory testimony by Hunter, the incriminating testimony by informer Newman and the accusatory testimony of Detective Rinaldi, as to what Green said the appellant had stated, indicates that there was a patent violation of the Sixth Amendment right of the appellant to confront the witness against him. Green's statements were received in evidence for their truth, although the declarant Green, a fugitive, could not be subjected to cross examination by the appellant. *Bruton vs. U. S.*, 391 U. S. 123, 88 S. Ct. 1620; *Nelson vs. O'Neil*, 402 U. S. 622, 629-630, 91 S. Ct. 1723. Hunter, Newman or Rinaldi could just have well read a written confession by Green to the Jury and Green's absence at the trial is comparable to an accomplice invoking the fifth amendment. *Douglas vs. Alabama*, 380 U. S. 415, 85 S. Ct. 1074.

The totality of these circumstances clearly dictate that this was not harmless error per se. The "rub off" effect, *Krulewitch vs. U. S.*, 336 U. S. 440, 69 S. Ct. 76; *Blumenthal vs. U. S.*, 332 U. S. 539, 559, 68 S. Ct. 248, was singularly directed at the appellant, since only he was on trial, the co-defendant Hunter had already pled guilty and the third defendant Green, also not on trial, was a fugitive. The prejudice was magnified since there was no "substantially identical evidence in the record" corroborating the out-of-court statements of Green so as to "support appellants conviction." *U. S. vs. Pacelli*, 470 F. 2d 67, 69 (2nd Cir. 1972). Neither the details contained

within the out-of-court statements, nor the circumstances in which the statements were allegedly uttered, are so patently dependable so that they have an "indicia of reliability." *Dutton vs. Evans*, 400 U. S. 74, 89, 91 S. Ct. 210.

Indeed, "pieces of evidence must be viewed not in isolation but in conjunction with one another." *U. S. vs. Geaney*, 417 F. 2d 1116, 1121 (2nd Cir. 1969). Logic dictates that but for these pieces of massive hearsay in violation of the confrontation clause, "every aspect of (appellant's) conduct is susceptible of an inference other than participation in the conspiracy." *U. S. vs. Calabro*, 449 F. 2d 885, 890 (2nd Cir. 1971).

All in all, the hearsay statements under the singular set of circumstances of this case, severely prejudiced the appellant's constitutional right to confront witnesses for purposes of cross examination. The cautionary instructions to the Jury proved ineffective, because of the crystal clear inculpatory nature of the statements and their vital importance to the prosecution's case. *U. S. vs. Catalano*, 491 F. 2d 268, 273 (2nd Cir. 1975); *U. S. vs. Cassino*, 467 F. 2d 610, 622 (2nd Cir. 1972). Most importantly, the instant case was created from hearsay, not supplemented by it. In other words, the hearsay declarations were not made in furtherance of an existing conspiracy in which the appellant was in fact participating, but instead were used to prove an alleged conspiracy in which the appellant in theory was supposed to be a participant. In short the Government case was anything but "very strong," *Paco* at 1103, so that being extremely weak, the devastating hearsay was to the tenuous independent evidence, what sound independent evidence should have been to incriminating hearsay.

Conclusion.

For all of the above reasons, to wit, the material and prejudicial variance between the indictment and the proof, the clear and substantial failure of the devastating hearsay declarations to pass the threshold test and the patent and crucial violation of the constitutional right of confrontation, the court in the genuine interests of justice, which concretely affords a defendant a realistically fair trial, should set aside the verdict of the jury and enter judgment in favor of the appellant, or in the alternative order a new trial with limiting instructions.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Defendant-Appellant.

ADDENDUM.

Title 21, U. S. Code.

Section 812: Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, IV, and V. • • •

PLACEMENT ON SCHEDULES; FINDINGS REQUIRED

(b) • • • a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

• • •

Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

• • •

INITIAL SCHEDULES OF CONTROLLED SUBSTANCES

(c) Schedules I, II, III, IV and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

* * *

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(4) Coca leaves and any salt, compound, derivative, or preparation of cocoa leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves, which extractions do not contain cocaine or ecgonine.

TITLE 21, U. S. CODE

Section 841: Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

PENALTIES

(b) Except as otherwise provided in section 845 of this title any person who violates subsection (a) of this section shall be sentenced as follows:

(I) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. * * * Any sentence imposing a term of imprisonment under this paragraph, shall in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such terms of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

TITLE 21, U. S. CODE

Section 846: Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18, U. S. Code.

Section 2: Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Amendment VI: Jury Trial for Crimes, and Procedural Rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX TO APPELLANT'S BRIEF.

DOCKET ENTRIES

CRIMINAL DOCKET - U.S. District Court

TTY OFFENSE PO ☐ NOR OFFENSE MO ☐ MISDEMEANOR Mis ☐ FELONY Fel ☒

JUDGE/MAGISTRATE Assigned: 0802 — Disp./Sentence: 0208 01 (District / Office)

U.S. vs. 01 - SORRENTINO, LOUIS (LAST, FIRST, MIDDLE)

Case Filed: Mo. 07 Day 06 Yr. 76 — Docket No. 0626 — Def. 01

JUVENILE ☐ — No. of Defs. 03

U.S. MAG. CASE NO. 76-207

BAIL • RELEASE

Denied ☐ AMT Set ☐ Fugitive ☐ Pers. Recog ☐ PSA ☐

$ 000 — Conditions: 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Pty Cust ☐ Other ☐

Date ☐ Bail Not Made ☐ Status Changed (See Docket) ☐

II. KEY DATES & INTERVALS

OFFENSES CHARGED	U.S. TITLE/SECTION	ORIGINAL COUNTS
Consp. to viol. Fed. Narco. Laws.	21:846	1
Possess. & distr. of Cocaine II.	21:812,841	2

SUPERSEDING COUNTS

ARREST or	INDICTMENT ☒	ARRAIGNMENT	TRIAL	SENTENCE
Inf. Custody Began 10:45 a.m. 2/25/76	Information ☐ 7-6-76	7-15-76	Trial Set For 9-8-76	Disposition of Charges 9-9-76
Summons Served	High Risk Date	Tst Plea 7-15-76	Voir Dire ☐	Convicted ☐
First Appearance	Indict. Waived ☐	Final Plea	☒ NG ☐ G ☐ NOL	Acquitted ☐
In Charging District	Superseding Indict/Info ☐		G. Plea (W/Drawn) ☐	Dismissed ☐
			Trial Began 9-8-76 ☐	On All Charges ☐
			Trial Ended 9-9-76	On Lesser * Offense(s) ☐
			☐ NG ☐ G ☐ NOL	WOP ☐ WP ☐
				On Government's Motion ☐

MAGISTRATE

	DATE	INITIAL/NO.		INITIAL/NO.	OUTCOME
Search Warrant: Issued / Return			INITIAL APPEARANCE DATE ▶ 2/25/76		☐ DISMISSED
Summons: Issued / Served			PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ 3/16/76; Date Held ▶	MDJ-080B	☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued	2/13/76	LB-080H	☐ WAIVED ☒ NOT WAIVED	Tape Number	☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT ▶	2/13/76	LB-080H	☐ INTERVENING INDICTMENT		
OFFENSE (In Complaint)	21 USC 812,841(a)(1),841(b)(1)(A) and 846 - NARCOTICS				

U.S. Attorney or Asst.: Federico E. Virella, Jr. 791-1984

ATTORNEYS — Defense ☐ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

* Show last names and suffix numbers of other defendants on same indictment/information

02-GREEN, 03-TATE, ~~04-LOVE~~

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
2/13/76	Complaint filed, warrant issued	
2/25/76	Defendant presented, represented by James Siff, Esq., 401 Broadway, N.Y. Defendant released until 2/26/76 to make $7,500 cash or surety.	
2/26/76	Defendant made $7,500 surety bond with Midland Ins. Co., defendant's address: 888 - 8th Ave., N.Y.	
7/6/76	Indictment filed, 76 Cr. 626	
7-15-76	Deft. with Atty. present pleads not guilty. 10 days for Motions. Bail $7,500. cash / secured by Midland Ins. Co. continued. Case assigned to Judge Weinfeld.	
7-27-76	Case called. Trial date set for Wed., Aug. 4, 1976 at 10am in Rm. 518. Weinfeld, J. Ward, J.	
7-28-76	Filed defts. memorandum of law.	
8-5-76	Filed one envelope ordered sealed and impounded and placed in vault in Cashier's office and not be opened until further order of this court. So ordered, Weinfeld, J.	

(Over)

FORM AO 256

DOCKET ENTRIES

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) (DOCUMENT NO.) PAGE TWO	V. EXCLUDABLE DELAY
7-28-76	Fld deft's affid & notice of motion for an order granting the deft certain discovery ,Requiring the Govt to provide the deft with a B/P R quiring the Govt to furnish the deft in advance of trial with a list of the witnesses it intends to call together with certain info. about each. Requiring the Govt to notify the defense whether it intends to use the deft in cross exam.	
8-4-76	Case called, Govt's application for adj as ao deft is granted till Monday 8-16-76 at 10;00AM in room 518....Weinfeld, J.	
8-13-76	Deft (aty present) appears deft waives his right to a speedy trial on the record. Trial adj to Thursday 8-26-76 at 10:00A.M in room 518. Deft's bail limits are ext to include the State of Fla. for 72 hours only. Deft is to notify his atty upon his return to N.Y. who in turn will notify the U.S. atty . Deft's bail limits prev. included EAstern & Southern District of N.Y. & also the States of Ohio & Penn...Weinfeld, J.	
7-30-76	Fld memo end on motion fld 7-28-76 Motion disposed of as indicated etc.....Weinfeld,J. M/N	
8-26-76	Filed Affdvt. of Ronald L. Garnett in support of a writ...writ iss. ret. 9-8-76.	
9-8-76	Jury trial begun before Weinfeld,J.	
9-9-76	Jury trial contd. and concluded. Guilty verdict as to cts. 1 and 2. PSI ordered. Sentence adj. to Thursday,Sept. 30,1976 at 10am in Rm.906. Bailcontd. as previously fixed by Mag. at ~~XXX~~ $7,500 cash or surety. Weinfeld,J.	
9-30-76	Filed JUDGMENT (atty. James Siff,present)-- the deft. is hereby committed tothecustody of the Atty. Gen. or his ahutorized representative for imprisonment for a period of THREE(3) YEARS on each of cts. one and two (1) & (2) to run concurrently with each other. Pursuant to the provisions of Title 21,USC,841,the deft. is placed on Special Parole for a term of THREE(3) YEARS to commence upon expiration of confinement. Deft. is contd. on bail pending appeal on condition that the appeal is filed expeditiously. Trial minutes are to be field forthwith and subject to the approval of the Court of Appeal the case ~~xxx~~ set for argument within 30 days. Weinfeldl,J. (copies issued)	
10-08-76	Filed Notice of Appeal from judgment dtd 9-30-76	
10-15-76	*Filed Transcript of [illegible], dated 8-23-76.*	
10-15-76	*Filed Transcript of [illegible], dated 9-8,9-76*	
10-15-76	*Filed Transcript of record of proceedings, dated 9-30-76.*	

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Indictment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

v.

LOUIS SORRENTINO, RICHARD TATE, and ALBERT GREEN,

Defendants.

76 Cr. 626

The Grand Jury charges:

1. From on or about the 5th day of February, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, LOUIS SORRENTINO, RICHARD TATE, and ALBERT GREEN, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about February 12, 1976 in the vicinity of 136 West 55th Street, New York, New York the defendants, RICHARD TATE and ALBERT GREEN, met and had a conversation about the sale of cocaine with Police Officer Charles Rinaldi.

2. On or about February 12, 1976, the defendants, LOUIS SORRENTINO and ALBERT GREEN, met in the vicinity of East 65th Street, New York, New York.

3. On or about February 12, 1976 the defendants, LOUIS SORRENTINO and ALBERT GREEN drove an automobile from the vicinity of East 65th Street to the vicinity of West 55th Street in New York, New York.

4. On or about February 12, 1976 Police Officer Charles Rinaldi received approximately 55.94 grams of cocaine hydrochloride from ALBERT GREEN, the defendant.

(Title 21, United States Code, Section 846.)

COUNT II

The Grand Jury further charges:

On or about the 12th day of February, 1976 in the Southern District of New York, LOUIS SORRENTINO, RICHARD TATE, and ALBERT GREEN the defendants, unlawfully and knowingly did distribute and possess with intent to

distribute a Schedule II narcotic drug controlled substance, to wit, approximately 55.94 grams (net weight) of cocaine hydrochloride.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

ROBERT B. FISKE, JR.
United States Attorney

Foreman

Judgment and Commitment.

UNITED STATES DISTRICT COURT,

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

LOUIS SORRENTINO,

Defendant.

Docket No. 76 Crim 626 (EW)

In the presence of the attorney for the government the defendant appeared in person on this date Month September Day 30 Year 1976

Counsel

☐ Without Counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ With Counsel (Name of counsel) James Evan Siff, Esq.

Plea

☐ Guilty, and the court being satisfied that there is a factual basis for the plea, ☐ Nolo Contendere, ☒ Not Guilty

Judgment and Commitment

Finding & Judgment

There being a verdict of ☐ Not Guilty. Defendant is discharged ☒ Guilty. Defendant has been convicted as charged of the offense(s) of unlawfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, cocaine hydrochloride. (Title 21, United States Code, §812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, §2.). And conspiracy so to do. (Title 21, United States Code, §846.)

Sentence or Probation Order

as charged

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years, on each of counts 1 and 2 to run concurrently with each other. -And- Pursuant to the provisions of T.21, U.S. Code, §841, the defendant is placed on Special Parole for a term of Three (3) Years, to commence upon expiration of confinement.

Special Conditions of Probation

Defendant continued on bail pending Appeal, on condition that the Appeal is filed expeditiously. Trial minutes are to be filed forthwith and subject to the approval of the Court of Appeals the case set for argument within Thirty (30) Days.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By

☒ U.S. District Judge
☐ U.S. Magistrate

Certified as a true

This Date Sept 30, 1976

By JOHN P. GRAGNANO
(X) Clerk

Verified Sept. 30, 1975

Service of three (3) copies of the [illegible] is hereby [illegible] this [illegible] day of [illegible], 197.

COPY RECEIVED
NOV 20 1978
ROBERT B. FISKE JR.

Attorney for